163-705

CERTIFICATE.

163-705

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~748~~ 409

THE SOUTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 9, 1894.

(15,632.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 16, 1894.

1 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun and held pursuant to law on the third Monday of November, A. D. 1893, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

THE SOUTHWESTERN RAILROAD COMPANY, Appellant,
vs.
THE CENTRAL RAILROAD & BANKING CO. OF GA., THE FARMERS' Loan & Trust Company, The Central Trust Company, *et al.*, Appellees.

Be it remembered that on the 13th day of June, 1894, the same being a day of said regular November term, 1893, of said United States circuit court of appeals, the following proceedings were had and entered of record on the minutes of said court in the words and figures following, to wit:

2 United States Circuit Court of Appeals, Fifth Circuit.

THE SOUTHWESTERN RAILROAD COMPANY, Appellant,
v.
THE CENTRAL RAILROAD & BANKING CO. OF GA., THE FARMERS' Loan & Trust Company, The Central Trust Company, *et al.*, Appellees.

Appealed from the circuit court of the United States for the southern district of Georgia, eastern division.

Before Pardee and McCormick, circuit judges, and Locke, district judge.

This cause comes up on an appeal from a final decree of foreclosure of the circuit court of the United States for the southern district of Georgia, eastern division, sued out pursuant to express leave granted in the decree, allowing it to be done without joining any codefendant therein.

Proceedings were first commenced by the filing of a bill by Rowena M. Clark, as a stockholder, against The Central Railroad and Banking Company of Georgia, The Georgia Pacific Railroad Company, its lessee, The Richmond and Danville Railroad Company, which was operating it under the lease, and The Central

Trust Company, who had standing in its name a majority of
3 the stock of the Central Railroad and Banking Company, and was charged with voting it in violation of the provisions of the constitution of Georgia.

Upon the hearing under this bill the lease was surrendered up when the court passed an order enjoining the voting of the stock, ordering a new election, and appointing receivers. In this state of the pleadings the Central Railroad and Banking Company filed its dependent bill for the purpose of preserving the integrity of its system, set out its liabilities, among which are bonds maturing January 1st, 1893, secured by three separate mortgages of the Central, Macon and Western, and Southwestern railroads, dated October 1st, 1872, made to the Farmers' Loan and Trust Company, and which bill states, after setting out this liability, "but said Central Railroad Company in leasing the Southwestern railroad assumed the payment of all its obligations." It also sets out the second mortgage to the Central Trust Company, secured by deed of mortgage dated April 1st, 1890, as to which the said dependent bill states that none of the bonds had then been sold, but seven million eight hundred thousand ($7,800,000.00) dollars were deposited to secure a loan of three million eight hundred and ninety-three thousand ($3,893,000.00) dollars to parties named.

This bill says that four million nine hundred and ninety-nine thousand ($4,999,000.00) dollars of said bonds "being reserved in the hands of the trustee to retire an equal amount of tripartite first-mortgage bonds hereinbefore described, with the right on the part of said Central Railroad Company to withdraw the remainder of said bonds from the hands of the trustee upon complying with the conditions of the deed of trust under which said bonds are issued."

4 At the filing of this defendant's bill the Southwestern railroad was being operated under a lease from it to the Central Railroad & Banking Company of Georgia dated June 24, 1869. Under this lease the Central railroad covenanted and agreed to pay the current expenses incident to the workings and management of the said Southwestern railroad "and all debts and claims against it which shall become due after that day."

It further agreed to keep in as good order as when received the Southwestern railroad and its appurtenances and to pay all taxes on the property, and "that in case it shall fail to pay any dividend to the stockholders or bond or interest on any bond within six months after the same shall become due and payable as thereinbefore provided it shall then be lawful for the board of directors of the said the Southwestern railroad to terminate this lease and to enter upon and to resume possession of its railroad and all property demised."

The Southwestern Railroad Company agreed to conform in all its financial operations after the date of the lease "to the views and wishes of the board of directors of the Central Railroad and Banking Company of Georgia" so far as it related to its then funded debt, "in renewing and issuing bonds, and otherwise to contract no

new obligations and create no new incumbrances" and make no extensions of its railroad without the consent of the board of directors of the Central railroad.

At the execution of this lease it was understood and expressed in a resolution of the directors of the Southwestern Railroad Company accepted and adopted by resolutions of the directors of the
5 Central that the Central Railroad and Banking Company will on its part in good faith assume and pay all claims against and obligations of the Southwestern Railroad Company remaining unpaid after the first day of December, 1869.

On the 23d day of January, 1893, the Farmers' Loan and Trust Company filed a bill in the eastern division of the southern district of Georgia to foreclose the three (3) separate mortgages given to secure the tripartite bonds and against the Central Trust Company. Thereafter, on the 20th of February, 1893, the Farmers' Loan and Trust Company filed its ancillary bill against the same defendants, including the Southwestern Railroad Company, in the western division of the southern district of Georgia. The only averment as to the Central Trust Company is, par. XVII, that it is the mortgagee in trust of certain mortgages to secure bond or obligations outstanding and unpaid, "and it makes it defendant that it may make such proof thereof as it may be advised." The twenty-first paragraph of this bill alleges the necessity of a sale by the same officer and at the same place under and by virtue of decrees made by each of the courts having jurisdiction of the property or any part thereof, acting in concert one with the other.

A copy of the mortgages given by the Southwestern railroad & the Central Railroad & Banking Company of Georgia, marked Exhibit- "A" and "B," are hereto annexed, the mortgage given by the Macon & Western railroad being substantially the same.

On the 3d day of April, 1893, the Southwestern Railroad Company filed its plea in this ancillary suit averring, among
6 other things, that its liability was as an accommodation maker only for its lessee, the Central railroad, annexing thereto a copy of its lease.

On May 1, 1893, the Central Trust Company filed its answer to this bill. This says that as the trustees of and under the consolidated first mortgage, dated April 1, 1890, being a second lien on the said line from Atlanta to Savannah and branch to Milledgeville, it is entitled to insist and will insist that should any decree of foreclosure and sale be rendered in this suit the same should not provide for a sale of the main line of the Central Company from Savannah to Atlanta aforesaid before a sale shall be had of the railway and properties of the Southwestern Company, but that, on the contrary, the holders of the bonds secured — said tripartite mortgages should be required to resort first to the fund arising from a sale of the railroad and property of the Southwestern Company before resort shall be had to any fund arising from a sale of the main line of the Georgia Central Company, as aforesaid.

On the 27th of May, 1893, an order was passed consolidating all the causes with all intervening petitions in the eastern division of

the southern district of Georgia, and the case for foreclosure pending in the western district was removed to the eastern division of the southern district of Georgia, to be consolidated with said other causes and proceed with them in said eastern division. This order granted leave to the Southwestern Railroad Company, without prejudice to its plea of file, to answer the bill, and also to file a cross-bill in aid of its answer against the codefendant-, The Central Railroad and Banking Company of Georgia, The Central Trust Company, and the complainant.

7 The Southwestern Railroad Company filed its answer June 5, 1893. This states that on the 18th of April, 1893, it served a notice upon its codefendant, The Central Railroad and Banking Company of Georgia; that upon each and every interlocutory hearing and a final trial, under the plea or answer filed in the above stated cause, that it proposed to make proof, by parol or otherwise, that all such liability that may be held to rest upon it under any of the tripartite bonds or the separate mortgage given in the name of this defendant October 1, 1872, is only that of a surety, and that a final decree will be asked for in the event any liability is established against it to fix and determine this fact of suretyship, with all the rights that enure therefrom in its favor under and by virtue of the laws of the State of Georgia, and particularly the act approved December 20, 1826, set forth and referred to in section 2165 of the Code of Georgia.

The cross-bill was filed June 5, 1893, which averred, among other things, as to the trust deed of April 1, 1890, that under the 7th item thereof that "it became and was the duty of the Central Trust Company, as to any rights passing under the said deed of trust, to protect and hold harmless the Southwestern Railroad Company from any liability whatsoever under the said tripartite bonds, and that the trustee could not acquire and did not acquire any right adverse thereto.

That each bond states on its face that it is made under the said act of 1872, and is one of those to be issued from time to time as the wants of said companies shall require, and, after stating the security of three separate mortgages of even date, says, "subject only to a prior mortgage amounting to one million dollars;" that each sep-

8 arate mortgage says it is provided, agreed, and understood that bonds of the Central Railroad and Banking Company of Georgia, amounting to $1,000,000, secured by mortgage dated September 1, 1865, are to be provided for and paid out of the issue of tripartite bonds thereunder.

The first prayer of the cross-bill was "to annul the separate deed of mortgage executed in its name October 1, 1872, and a removal of the cloud upon its title to its franchises and property; that in default thereof that the court will decree that it occupies the position of surety only, is entitled to subrogation by reason thereof, and that any decree that may be rendered shall be enforced primarily against the property of the Central Railroad and Banking Company of Georgia."

The Farmers' Loan and Trust Company, in answer to this cross

bill, admitted that the Southwestern went into possession of the Central under a lease in perpetuity, dated June 24th, 1869, and that the lessee has retained possession ever since, until the receiver of the Central entered into possession; that it was invited to become trustee by William M. Wadley, president Central railroad; that the bonds were received from the National City bank; that $4,000,000 were delivered on the order of William M. Wadley, president Central railroad, and that under the provisions of the mortgages it, the Farmers' Loan and Trust Company, exchanged one million of tripartite bonds for one million bonds of the Central Railroad and Banking Company.

The Central Trust Company filed its answer, and, replying to the 8th interrogatory for discovery, says it has in its possession four million nine hundred and ninety-nine thousand ($4,999,000.00) dollars of bonds held for the purpose, provided and set forth in said consolidated mortgage of April 1, 1890, and, in reply to the
9 9th interrogatory, says it has received no specific notification of said default from any holders of said bonds or any of them, so far as it knows or is able to state, and that it has not received any notification from any holders to proceed to take action under the said mortgage, except that it has received notification from holders of said bonds or some of them to take such action as may be necessary for the prevention of any wrong or injustice which may be caused to them or their interests by any decree to be entered in this suit.

The Central Railroad and Banking Company answered the cross-bill and say in answer thereto and interrogatories for discovery:

Third. This defendant admits that the recitals of the act of the legislature approved on the 30th day of August, 1872, as contained in the third paragraph of said bill, are correct, and admits that the said act was introduced and passed at the instance of this defendant.

Sixth. That on December 1st, 1869, when it took possession of the railroad and other property of the Southwestern Railroad Company under the terms of the said lease, there was then outstanding $699,500 of bonds of the Southwestern Railroad Company and of the Muscogee Railroad Company assumed by the Southwestern Railroad Company, and that this defendant thereafter paid off and discharged all of the said $699,500 of the said bonds in accordance with the provisions and covenants of the contract of lease.

Seventh. That as between the Central Railroad and Banking Company of Georgia and the said Southwestern Railroad Company it was recognized at the time of the issue of said bonds and it has always been recognized as a fact that the Central Railroad and
10 Banking Company of Georgia was primarily liable on said tripartite bonds and on all of the financial operations of this company; the said tripartite bonds were treated as a direct obligation of this company, and in making and issuing its $13,000,000 mortgage on the 1st day of April, 1890, it was provided that $4,999,000 of said bonds should be retained by the trustee of said

deed of trust securing said bonds to pay off the said $4,999,000 of tripartite bonds when the same became due.

Eighth:

(3.) A large part of the $5,000,000 of bonds secured by the three several mortgages were sold or exchanged by this defendant after November 26th, 1872, the report of November 30th, 1872, showing that only $895,000 of said bonds were outstanding at that time.

(4.) The entire proceeds arising from the sale of $4,000,000 of the bonds were received by this defendant alone.

The following is the act of the legislature authorizing the issuance of the bonds & execution of mortgages:

AN ACT

To authorize the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company to issue bonds and execute mortgages, and for other purposes therein named.

Whereas, the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company have each issued and disposed of bonds which will shortly mature, and should be provided for, and said companies also desire to make important improvements, and provide additional facilities for transportation and travel, which will require the use of their credit to provide the necessary means for the same; and

11 Whereas, the two last-mentioned railroads have been leased by the Central Railroad and Banking Company of Georgia, thus uniting the interest of the three said railroads, therefore:

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, That the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company and the Macon and Western railroad be, and are hereby authorized and empowered, to issue the joint and several bonds of the said three railroad companies to the extent of five millions of dollars, of such denomination and bearing such rate of interest and payable in gold or currency as the respective boards of directors of said three railroad companies may or shall decide, the decision of the board of directors of each of said three railroad companies being necessary before the issue or disposal of any of the joint and several bonds hereby authorized.

SEC. 2. Be it further enacted, That the joint and several bonds provided for by the first section of this act, shall be signed by the president and cashier of the Central Railroad and Banking Company of Georgia, and by the president and treasurer of each of the other two railroad companies herein named, and then shall be binding upon each of said railroad companies jointly and severally.

SEC. 3. Be it further enacted, That should the respective boards of directors of said three railroads named in this act prefer and desire to issue the bonds of any one of said three railroad companies to be endorsed and guaranteed by the other two of said com-

panies, instead of the joint and several bonds authorized by the first section of this act, then, and in that case, the said three railroads companies are hereby authorized and empowered so to
12 issue and endorse and guarantee said bonds, not to exceed five million of dollars in all.

SEC. 4. Be it further enacted, That the said "The Central Railroad and Banking Company of Georgia," "The Southwestern Railroad Company," and "The Macon and Western Railroad Company" for the purpose of securing the payment of bonds hereinbefore authorized to be issued and disposed of according to the tenor and effect thereof, and of all interest to become due thereon, are hereby authorized and empowered each of said railroad companies through its proper officers for itself, to mortgage, or convey in trust by way of mortgage, all their property, estate, rights, privileges, and franchises, now or hereafter to be held or granted, such mortgage or conveyance in trust by way of mortgage, to be good and sufficient in law and equity, without the purchasers or holders of said bonds being required or held liable to see to the proper application of the purchase-money to be paid for the same; said mortgages or conveyances in trust, by way of mortgage, to be executed by each of said companies named on its own railroad property and franchises, after a resolution for that purpose shall be passed by the board of directors of each of said companies respectively.

The mortgage or conveyance in trust by the Central Railroad and Banking Company of Georgia, to be signed by its president and cashier, and the mortgage or conveyance in trust of each of the other two railroad companies, to be signed by the president and treasurer thereof.

SEC. 5. Be it further enacted, That all laws and parts of
13 law militating against the provisions of this act are hereby repealed.

L. N. TRAMMEL,
President of the Senate.

T. W. J. HILL,
Secretary of the Senate.

JOS. B. CUMMING,
Speaker of the House.

J. D. WADDELL,
Clerk of the House.

Approved August 20, 1872.

JAMES M. SMITH, *Governor.*

The passage of this act was procured by the directors of the Central R. R. & B. Co. of Ga., and the Southwestern R. R. Co. had no part or agency in the same.

After the passage of the act action was had by the directors of the Southwestern R. R. Co. as follows:

Southwestern Railroad Company.

MACON, GA., *Sept. 5th*, 1872.

At a meeting of the board of directors of this company, held at their office this day, were present—

Wm. S. Holt, president; Wm. M. Wadley, Jno. L. Mustian, Jno. E. Jones, Virgil Powers, directors.

Minutes of the last regular and called meeting in Savannah confirmed.

Caption of an act recently passed by the General Assembly of the State of Georgia authorizing the Central, Southwestern, and
14 Macon and Western Railroad Companies to issue joint bonds for $5,000,000, payable twenty years after date, was read before the board; also a resolution of the board of directors of the Central Railroad and Banking Company, setting forth their action on said issue and asking this board to take similar action, was, on motion, postponed until a copy of said act was obtained, or that General Lawton could be present and unite with us in our deliberations upon the subject.

Southwestern Railroad Company.

MACON, GA., *Sept. 10th*, 1872.

At a called meeting of the board of directors of this company, held at their office this day, were present—

Wm. S. Holt, president; Wm. M. Wadley, Alex. R. Lawton, Jno. E. Jones, Jno. L. Mustian, Virgil Powers, directors.

Minutes of last meeting *was* read, and, after striking out the sentence "payable 20 years after date," confirmed.

The resolution passed by the board of directors of the Central Railroad and Banking Company of Georgia on the 30th inst., touching the issue of joint and several bonds and mortgages, having been presented by the president of that company, which is as follows:

Central Railroad and Banking Company of Georgia.

SAVANNAH, *3d Sept.*, 1872.

The following preamble and resolutions is a true extract from the minutes of this company of this date:

* * * * * * *

Whereas the General Assembly of the State of Georgia has
15 passed an act entitled An act to authorize the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company to issue bonds and to execute mortgages and for other purposes therein named, approved August 20th, 1872, which provides for the issue of the joint and several bonds of said three railroad companies, not to exceed in all five million dollars, and also execution of mortgages or conveyances in trust by way of mortgages *or conveyances in trust by way of mortgage* of each of said railroads,

their property and franchises, to secure the payment of said bonds; therefore—

Resolved, That the president of this company be, and he is hereby, authorized and requested to have prepared and issued seven per cent. coupon bonds of the denomination of one thousand dollars each, not to exceed in all five millions of dollars, to fall due January 1st, 1893, and to execute a mortgage or conveyance in trust by way of mortgage of the railroad and appurtenances and all the other property and franchise of this company to secure the payment of the same, said bonds and mortgage to be signed by the president and cashier and sealed with the corporate seal of this company, the coupons to be signed by the cashier.

And the president is also authorized and requested to procure the signatures and seals of the Southwestern Railroad Company and of the Macon and Western Railroad Company to said bonds, so as to make the joint and several bonds of said three railroad companies in terms of said act, and also to procure the execution of mortgages by each of said two other companies to secure the payment of said bonds.

16 * * * * * * *

T. M. CUNNINGHAM, *Cashier.*

* * * * * * *

On motion of J. E. Jones, Esq., it was—

Resolved, That this company will join the Central Railroad and Banking Company of Georgia and the Macon and Western Railroad Company in the execution of the joint and several bonds provided for by an act entitled "An act to authorize the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company to issue bonds and execute mortgages and for other purposes named," and also will execute a mortgage on its railroad, franchises and other property to secure the payment of said bonds in terms of said act, and that the president and treasurer of this company will sign said bonds and mortgages or conveyances in trust by way of mortgage and cause the corporate seal of this company to be affixed to the same, and that the treasurer will sign the coupons attached to said bonds whenever they shall be requested so to do by the president or other proper officer of the Central Railroad and Banking Company of Georgia.

* * * * * * *

JOHN T. BOIFEUILLET, *Secretary.*

The bonds, when executed, were taken into the exclusive possession of the Central R. R. & B. Co. and were by that company disposed of as it saw fit and proper, except as to one million of dollars which were used, as provided in the mortgages, to take up the bonds of the Central R. R. alone issued to equip that road after the war.

17 The proceeds of the remaining four millions of dollars were received and placed to the credit of the Central R. R. on its

own books, and on said books of the Central the S. W. was not credited with any portion of the same.

The S. W. R. R. never received any of the money or proceeds arising from the sale or disposition of said bonds and never demanded or claimed any portion of the same from the Central R. R. Co. The reports and books of the Central R. R. show that these bonds were always set down as a liability of the Central, payable by it, and that on the books of the Central Company this debt was never set down as one to pay which or any part thereof the Southwestern R. R. Co. would be liable, as between the two said railroad companies; that on the books of the Southwestern R. R. Co. the tripartite bonds were never set down as a debt of the company, and in no financial statement of that Co. were these bonds ever mentioned as a debt of said company; that for nineteen years the semi-annual interest was paid on the bonds by the Central R. R. Co., and during that period the Southwestern was never called on to contribute to the payment thereof, and in no instance was the S. W. R. R. ever charged on the books of the Central with any part of the interest thus paid; that all proceeds arising from the sale of the bonds went into the treasury of the Central as any income from the use or operation of its road; that when maturity was approaching no demand was made on the S. W. R. R., but the Central proceeded to encumber its own property only by deed to the Central Trust Company providing for an exchange bond for bond of its own obligations for those of the three companies.

That the bonded indebtedness of the Southwestern was not paid by the Central from the proceeds of the tripartite bonds, but
18 out of any funds in its treasury into which went to be used in the same way all the stocks, bonds, and assets of the Southwestern owned at the date of the lease and of the estimated value of one million of dollars.

That extension- from time to time were made of the Southwestern road by the Central as lessee, but all expenses so incurred were paid by an issue of stock delivered to the Central at the then market value and either sold or retained by the Central.

That in a report made by a committee of stockholders to the directors Dec. 4, 1875, this mode of procedure and payment was recognized and accepted, at which time they reported as to estimated losses arising from operating the Southwestern, "It is not an asset, because under the terms of the lease and in part consideration for the same the Central was bound to pay current expenses incident to the working of the Southwestern."

That Ridgeway Smith, a stockholder, having filed a bill April —, 1891, attacking the legality of the proposed issue, the Central R. R. & B. Co. answered under the oath of its president and averred "*in judicio*" that it proposed to issue the bonds for the purpose of redeeming existing outstanding obligations of the corporation then constituting a lien on the mortgaged property, all which outstanding bonds it was bound to pay; that the Central Trust Co adopted this answer, and a decree was rendered establishing their legality, in

which the court found this tripartite debt was virtually the debt of the Central.

Upon the several hearings of said cause, on the pleadings and evidence submitted, the court adjudged and decreed as follows:

1st. The mortgage given by the Central Railroad & Banking Company of Georgia to secure said tripartite bonds was foreclosed upon the property of said railroad company included in said mortgage and adjudged to be a first lien upon said property.

2d. The mortgage given by the Southwestern Railroad Company to secure said tripartite bonds was foreclosed upon the property of said railroad company included in said mortgage and adjudged to be a first lien upon said property.

3d. The mortgage given by the Central Railroad & Banking Company of Georgia to the Central Trust Company of New York, bearing date April 1st, 1890, securing payment of the consolidated first-mortgage five per cent. gold bonds of the Central Railroad & Banking Company of Georgia (outstanding to the amount of $8,000,000 of principal, par value), was adjudged and decreed to be a valid and subsisting mortgage and to constitute "a lien to the extent of the amount to be ascertained to be owing upon the said bonds and the coupons thereunto appertaining to the amount of the debts for the payment of which said bonds were hypothecated next after the lien of the mortgage to the Farmers' Loan & Trust Company upon the property and premises of the Central Railroad & Banking — of Georgia" described in the said mortgage to the Central Trust Company of New York.

4th. That upon the sale of the said mortgaged property of the Central Railroad and Banking Company of Georgia under said judgment and decree of foreclosure of the said mortgage of the said company to the Farmers' Loan & Trust Company there should be paid out of the proceeds of said sale two-thirds of the amount adjudged and decreed to be due and unpaid on the said mortgage and on the said tripartite bonds and the coupons thereof.

5th. That upon the sale of the said mortgaged property of the Southwestern Railroad Company under said judgment and decree of foreclosure of the said mortgage of the said company to the Farmers' Loan & Trust Company there should be paid out of the proceeds of said sale one-third of the amount adjudged and decreed to be due and unpaid on the said mortgage and on the said tripartite bonds and the coupons thereof.

6th. That in the making and issuing said tripartite bonds the relation of principal and surety did not exist between the Central Railroad & Banking Company of Georgia and the Southwestern Railroad Company, and that such relation has not subsequently existed between said companies.

7th. That the Southwestern Railroad Company is not entitled to be subrogated as against the property of the Central Railroad & Banking Company of Georgia for its reimbursement of any sum or sums the Southwestern Railroad Company may pay in extinguishment of

the tripartite bonds under the decree of foreclosure rendered in the case with the same lien as that held by the debt thus extinguished.

8th. That the Southwestern Railroad Company, as against the Central Trust Company of New York and the holders of bonds represented by it, has no right of subrogation against the property of the Central Railroad & Banking Company of Georgia for its reimbursement of any sum or sums the Southwestern Railroad Company may pay in extinguishment of the tripartite bonds under the decree of foreclosure rendered in the case, with the same lien as that held by the debt thus extinguished.

9th. That under the case made the Southwestern Railroad
21 Company was not entitled to have the decree so moulded as to require the property of the Central Railroad and Banking Company first sold and exhausted for the payment of said tripartite bonds, the property of the Southwestern Railroad Company to be thereafter subjected to the payment of such portion of said tripartite bonds as should still remain unpaid.

The judgment and opinion of the circuit justice presiding in said cause is hereto annexed, marked Exhibit "C."

The decree of foreclosure in said cause is hereto attached, marked Exhibit "D."

The said several rulings and judgments and the said decree were upon appeal to this court assigned as error by the appellants.

Whereupon the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the Supreme Court of the United States in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeal and define and regulate in certain cases the jurisdiction of the circuit courts of the United States and for other purposes," approved March 3d, 1891, to wit:

1st. Under the pleadings and undisputed facts established by the evidence as hereinbefore recited, does the relationship of principal and surety exist between the Central Railroad & Banking Company of Georgia and the Southwestern Railroad Company in regard to the indebtedness created and represented by the tripartite
22 bonds as secured by the three several deeds of trust executed on the first day of October, 1872, by the Central Railroad & Banking Company of Georgia, the Macon & Western Railroad Company, and the Southwestern Railroad Company to the Farmers' Loan & Trust Company, trustee?

2d. If the above is answered in the affirmative, is the Southwestern Railroad Company estopped by the act of the legislature of the State of Georgia, entitled "An act to authorize the Central Railroad & Banking Company of Georgia, the Southwestern Railroad Company, and the Macon & Western Railroad Company to issue bonds and execute mortgages, and for other purposes therein named," approved August 20th, 1872, and by the terms of the trust deed granted by the Southwestern Railroad Company on the 1st day of October, 1872, from setting up as against the Farmers' Loan &

Trust Company, trustee, the relation of principal and surety as between the Central Railroad & Banking Company of Georgia and the Southwestern Railroad Company to such an extent that such relationship of principal and surety ought not to be fully recognized in the decree of foreclosure rendered in this case?

3d. Under the pleadings and facts of the case, as hereinbefore recited, is the Southwestern Railroad Company entitled to have the relationship of principal and surety, if existing between it and the Central Railroad and Banking Company of Georgia, so far recognized in the decree as to provide that as to any sum or sums the Southwestern Railroad Company may pay in extinguishment of the tripartite bonds under the decree of foreclosure rendered in the case the Southwestern Railroad Company shall be subrogated as of right against the Central Railroad & Banking Company of Georgia with the same lien as that held by the debt extinguished?

23 4th. Under the pleadings and undisputed facts of this case is the Southwestern Railroad Company estopped from setting up the relation of principal and surety, if the same exist, between it and the Central Railroad and Banking Company of Georgia, and the Southwestern's right of subrogation to the lien created by the tripartite mortgage, as against the Central Trust Company of New York, trustee, and all holders of bonds under the deed of trust granted by the Central Railroad & Banking Company of Georgia to the Central Trust Company of New York on the 1 day of April, 1890, to secure the payment of a series of bonds therein described and issued to the amount of $13,000,000?

It is further ordered that the clerk transmit to the Supreme Court a copy of the printed record and all briefs filed in the case.

EXHIBIT "A."

STATE OF GEORGIA:

Whereas, by an act of the General Assembly of the State of Georgia, entitled "An act to authorize the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company and the Macon and Western Railroad Company, to issue bonds and execute mortgages, and for other purposes therein named," approved August 20th, 1872, the said three railroad companies above named were authorized and empowered to issue the joint and

24 several bonds of the said three railroad companies to the extent of five million dollars, should the respective boards of directors of said companies decide to do so, by resolutions passed for that purpose;

And whereas, by said act of the General Assembly of the State of Georgia, hereinbefore referred to, the said The Central Railroad and Banking Company of Georgia, The Southwestern Railroad Company, and The Macon and Western Railroad Company, for the purpose of securing the payment of the bonds therein authorized to be issued and disposed of, according to the tenor and effect thereof, were also authorized and empowered to mortgage or convey in trust, by way of mortgage, all the property, estate, rights, privileges

and franchises, of said railroad companies, each executing said mortgage for itself, by and through its proper officers.

And whereas, the board of directors of each of said railroad companies, by resolutions passed for that purpose, have authorized the issue of said bonds to the extent of five millions of dollars, and the execution of mortgages, or conveyances in trust by way of mortgage, to secure the payment of said bonds, in terms of the said act of the General Assembly of the State of Georgia.

And whereas, the said three railroad companies hereinbefore names are about to execute, issue and dispose of, their joint and several bonds designated as "seven per cent. mortgage bonds issued under an act of the legislature of Georgia, approved August 20th, 1872," in a series of five thousand, numbered from 1 to 5,000 inclusive, of one thousand dollars each, to bear even date with these presents, and to be payable on the first day of January, in the year of our Lord, one thousand eight hundred and ninety-three, at the
25 National City Bank of the City of New York, with interest thereon at the rate of seven per cent. per annum, payable on the first day of January and July of each year, which said bonds are to be in the form of the following, that is to say:

No. —. UNITED STATES OF AMERICA, *State of Georgia.* $1,000.

The Central Railroad and Banking Company of Georgia, the Macon and Western Railroad Company, and the Southwestern Railroad Company of Georgia.

Seven per Cent. Mortgage Bond.

Issued under an act of the legislature of Georgia approved August 20th, 1872.

do hereby acknowledge themselves jointly and severally to owe and be indebted to Moses Taylor or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said companies jointly and severally promise to pay to the said Moses Taylor or to the bearer thereof at the National City Bank of the City of New York, on the first day of January, in the year of our Lord, eighteen hundred and ninety-three, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, the first payment to be made on the first day of January, eighteen hundred and seventy-three, upon the presentation and surrender of the annexed interest warrants as they shall become severally due.

26 This bond is one of a series of five thousand of a like tenor and date, each for one thousand dollars, in the aggregate amounting to five millions of dollars, which are to be issued from time to time, as the wants of said companies shall require, which said bonds are secured by three separate mortgages, bearing even date herewith, upon all the railroads of said companies which have been or may hereafter be constructed, subject only to a prior mortgage amounting to one million of dollars.

The holder of this bond may at any time have it registered on

the books of the companies, at their office or agency in the city of Savannah, or the city of New York, and such registry shall be endorsed hereon, after which it can only be transferred by the owner on said books in person or by attorney, to bearer, or to person or persons named in such transfer.

In witness whereof, the said The Central Railroad and Banking Company of Georgia has caused this bond to be signed on its behalf by its president and cashier, and the said The Macon and Western Railroad Company and The Southwestern Railroad Company, each by its president and treasurer; and each of said companies respectively has caused its corporate seal to be hereunto affixed, this the first day of October, eighteen hundred and seventy-two.

THE CENTRAL R. R. AND BANKING CO. OF GA.,

By —— ——, *Cashier.*

—— ——, *President.*

THE MACON AND WESTERN

27 RAILROAD COMPANY,

By —— ——, *Treasurer.*

—— ——, *President.*

THE SOUTHWESTERN RAILROAD COMPANY,

By —— ——, *Treasurer.*

—— ——, *President.*

Each and every one of said bonds having warrants or coupons attached to the same for the interest to fall due thereon.

And, whereas, the Central Railroad and Banking Company of Georgia, and the Macon and Western Railroad Company, have each executed mortgages or conveyances in trust by way of mortgage, to secure the payment of said bonds in terms of said act of the General Assembly of the State of Georgia, approved August the 20th, 1872, which mortgages or conveyances in trust, bear even date with these presents.

Now, therefore, this indenture, made and entered into this first day of October, one thousand eight hundred and seventy-two, by and between the Southwestern Railroad Company, a corporation under the laws of the State of Georgia, party of the first part, and the Farmers' Loan and Trust Company of the City of New York, party of the second part, witnesseth:

That the said party of the first part, in consideration of the premises, and of five dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, for the purpose of securing the punctual payment of both the principal and interest and all of said bonds alike: hath granted,

28 bargained, and sold, transferred and conveyed, and by these presents doth grant, bargain and sell, transfer and convey and set over, to the party of the second part, and its successors and assigns, all and singular the railroad of the said party of the first part, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the cities of Columbus,

Eufaula, Fort Gaines and Albany, respectively, in all, two hundred and fifty miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description, now held or hereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad, or any part thereof or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad, or the construction, maintenance or use thereof, now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed or exercised by the said party of the first part, and all the income, rents and revenues, arising from the same, together with all the rights, members and appurtenances to the said property above described, belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law
29 or in equity of the said party of the first part, of in and to the said property, and every part thereof, with the appurtenances.

To have and to hold the said railroad and all its parts, all and singular, and the said premises, and every part thereof with the appurtenances, unto the said party of the second part, its successors and assigns. But upon the following express conditions and trusts that is to say:

In trust, until a default shall be made by the said party of the first part in the payment of the principal or interest of the said bonds, or any one or more of them, according to the tenor and effect thereof, to permit the said party of the first part, to possess, manage and enjoy, the said railroad and every part thereof with its franchises, equipments and appurtenances, and all and singular the property above described and conveyed, and to make and use the tolls, income, rents, issues and profits thereof, in the same manner as if this deed had not been made; and further, if the said party of the first part shall well and truly pay, or cause to be paid, the principal and interest of the said bonds, and every of them, according to the tenor and effect thereof, and of the coupons attached thereto, then the estate, right, title and interest hereby conveyed, and this indenture and every article and clause herein contained, as well as the said bonds, shall cease, determine and be void and the right and title to the premises hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgement of satisfaction, reconveyance, reentry or other act.

But upon the further express condition and trust, that in case the said The Central Railroad and Banking Company of Georgia,

and its co-obligors, shall fail to pay the principal or any part
30 thereof, of any of the said bonds above described, to be issued under and secured by this deed of trust, at any time when and where the same shall become due and payable, according to the tenor and effect thereof, and for sixty days thereafter, it shall be competent and lawful for the said party of the second part, and its successors or assigns, to enter upon the said railroad and premises and property herein described, and every part and parcel thereof, with the appurtenances, and take possession of the same, without let or hindrance of the party of the first part and to appoint an agent to operate and manage the same, and receive the revenues and income thereof, applying the said fund to keep the same in good order and repair, and the surplus to pay the interest and principal of all the bonds which may be outstanding, and secured hereby *pro rata;* or it may apply in its discretion, to the proper court having jurisdiction of the same, of either the State or the United States, and sitting in the State of Georgia, for the sale thereof, or it may sell the same in the manner hereinafter specified.

And upon the request of the holders of one-fifth in amount of the bonds, which at any time may be outstanding under this deed of trust, with any part of the principal or interest thereof due and paid, it shall be the duty of the said party of the second part, by its president or agent duly appointed in its behalf, to enter upon and take possession of said railroad and property herein described, and all and singular, and each and every part and parcel thereof, and assumes its management, until the arrears of both principal and interest shall be paid, or the property sold, as herein prescribed, receiving the rents revenues and income thereof and applying them in the same manner as above stated, when the said
31 party of the second part enters upon and assumes possession and management of said property without the request of bondholders. And in case the arrears of interest and principal shall not be paid within six months from the time of said request by the bondholders as above stated, and earlier, in the discretion of said trustee, party of the second part, it shall be the duty of the said party of the second part to institute the proper proceedings in the proper courts, to procure a judgment or decree for the sale of said property and premises, and all and singular every part and parcel thereof. Or the said trustee may cause the same to be sold at public auction, to the highest bidder, at the front door of the court-house in the city of Savannah, first giving three months' notice thereof, before the day of sale, in one of the daily papers published in each of the cities of New York, Savannah and Macon, stating the time and place of sale, the description of the property to be sold and the terms of sale; and upon such sale being made, the said party of the second part shall execute a deed of the same, which deed shall be a bar against the said party of the first part, its successors and assigns, from and against all claim of the said party of the first part, and all its right of redemption therein, and shall convey full and absolute title therein to the purchaser,

free and clear of all incumbrances thereon, and of all claims, rights or equities of the said party of the first part, its successors or assigns, and without any obligation on the purchaser to see to the application of the purchase-money.

And the said party of the second part shall, after deducting from the proceeds of said sale the costs and expenses thereof, and of managing the said property, and enough to indemnify and save itself harmless from all liabilities arising from this trust,
32 apply so much of the proceeds of said sale of said property as may be necessary to the payment *pro rata* of all the interest and principal of said bonds outstanding and unpaid, and shall pay the residue thereof to the party of the first part, its successors or assigns. It being expressly understood and agreed by the said party of the first part, that in no case shall any claim be made under, or any advantage taken of any valuation, appraisement, redemption or extension law now existing, or hereafter to be enacted by it, its successors or assigns, the benefit of all such laws hereby being expressly waived; nor shall any injunction or stay of proceedings be had or applied for, nor any process applied for or obtained by it or them, to prevent such entry, or sale or conveyance, as is above provided for and set forth.

It is, however, expressly agreed between the parties to these presents that the said party of the first part may dispose of the current revenues and income of all the said property and railroad hereby conveyed, in such manner as it shall elect, until default shall be made in the payment of the principal or interest of said bonds, or of some one or more of them, and shall have the right to sell and dispose of any such real estate or other property of any description as it may own or acquire, which may not be necessary for the purposes and business of the said line of railroad, which said sale and conveyance of such real estate and other property shall transfer the said property and title free from the encumbrance of this mortgage or deed of trust.

And it is further agreed and expressly understood that every bond issued under this mortgage or deed of trust shall be countersigned by the said party of the second part, and certified to be one of the series authorized to be issued and secured by this deed of trust, and no bond shall be valid under this deed, or entitled
33 to its protection and security unless it shall be so certified.

And it is also further provided, agreed and understood, that inasmuch as there are certain bonds now outstanding of the Central Railroad and Banking Company of Georgia, amounting to one million dollars in all, secured by a mortgage or deed of trust, executed by said railroad company, to Moses Taylor and James Robb, both of the city of New York, and bearing date the first day of September in the year one thousand eight hundred and sixty-five, which are to be provided for and paid with and from the proceeds of the bonds hereinbefore described, and which are intended to be secured by this mortgage or deed of trust, so that there shall be no prior incumbrance upon the property and franchises of the said The Central Railroad and Banking Company of Georgia; the

cashier of the said last-mentioned company shall file a list of all the said present outstanding bonds, with the said party of the second part, and also a list of all such bonds now outstanding which may from time to time be paid in such manner that the said party of the second part shall always have full knowledge of all the bonds of the said The Central Railroad and Banking Company of Georgia, which may be unpaid under said former issue; and it shall be the duty of said party of the second part always to withhold its countersign and certificate from so many of the bonds herein provided for and secured as there shall be bonds of said former issue outstanding, and when all said outstanding bonds shall be paid, then said party of the second part shall, if requested by the said party of the first part, certify and countersign the remainder of the bonds provided for herein, as in other cases.

And it is hereby mutually agreed, that the said party of the second part, its successors in the trust and assigns shall only
34 be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agent employed by it or them, when such agent shall have been employed with reasonable discretion, and that the said party of the second part and its successors in the trust shall be entitled to reasonable compensation for their services in the management of said trust.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant and agree to and with the said party of the second part, its successors and assigns to execute and deliver any further reasonable and necessary conveyance of the said railroad premises or property, or any further assurance whatever, for the purpose of carrying into effect the objects and purposes of this indenture, that counsel learned in the law may deem necessary or advisable.

In witness whereof the said party of the first part has caused its corporate seal, with the signatures of its president and treasurer to be hereto affixed, and the said party of the second part has, in its corporate name and style, by its president, signed the same and caused its official seal to be appended thereto, and the said party of the first part, by its president, has duly acknowledged the execution of the same before the proper officer to take acknowledgment of deeds in the State of Georgia.

WM. S. HOLT, *President.*
[SEAL.] JOHN T. BOIFEUILLET, *Treasurer.*
THE FARMERS' LOAN AND TRUST COMPANY,
[SEAL.] By R. G. ROLSTON, *President.*

Attest: GEO. P. FITCH.
EDWIN F. COREY, JR.

35 Signed, sealed, and delivered in presence of—
GEO. B. TURPIN,
J. MONROE OGDEN,
Notary Public, Bibb County, Ga.,
As to signatures of W. S. Holt, president, and J. T. Boifeuillet, treasurer.

STATE OF GEORGIA, }
Bibb County. }

This is to certify that on the first day of October, A. D. 1872, personally appeared before me in said county Wm. S. Holt, president of the Southwestern Railroad Company, personally known to me, and, having made oath that he is such president and that the foregoing deed was made with the authority and under a resolution of the board of directors of said company and the seal of said company was duly by said board authorized to be attached thereto, and that he was authorized and directed to execute the same, acknowledges that the signature of said company, by himself as president, attested by the treasurer, was made thereto on behalf of said company and the seal of the company thereto appended, and that said signature was his free act and deed and the act and deed of said company, and the seal the seal of said company, and the deed is the deed of said company, made and executed for the purpose therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

J. MONROE OGDEN,
[SEAL.] *Notary Public, Bibb County, Georgia.*

36 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this fourth day of October, A. D. 1872, before me, Edwin F. Corey, Jr., a commissioner for the State of Georgia, duly commissioned and qualified, and residing in said city of New York, personally appeared Rosewell G. Rolston, president of the Farmers' Loan and Trust Company, who is personally known to me, and, having made oath that he is such president, and that the foregoing deed was made with authority and under a resolution of the board of directors of said company, and the seal of said company was duly by said board authorized to be attached thereto, and that he was authorized and directed to execute the same, acknowledges that the signature of said company, by himself as president, attested by the secretary, was made thereto on behalf of said company and the seal of the company thereto appended, and that said signature was his free act and deed and the act and deed of said company, and the seal the seal of said company, and the deed is the deed of said company, made and executed for the purposes therein named and mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY, JR.,
[SEAL.] *Commissioner for the State of Georgia in New York.*

37 EXHIBIT "B."

STATE OF GEORGIA:

Whereas, by an act of the General Assembly of the State of Georgia entitled "An act to authorize the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company and the Macon and Western Railroad Company, to issue bonds and execute mortgages and for other purposes therein named," approved August 20th, 1872, the said three railroad companies above named, were authorized and empowered to issue the joint and several bonds of the said three railroad companies to the extent of five millions of dollars, should the respective boards of directors of said companies decide to do so, by resolutions passed for that purpose.

And whereas, by said act of the General Assembly of the State of Georgia, hereinbefore referred to, the said The Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company, for the purpose of securing the payment on the bonds therein authorized to be issued and disposed of, according to the tenor and effect thereof, were also authorized and empowered to mortgage or convey in trust, by way of mortgage, all the property, estate, rights, privileges and franchises of said railroad companies, each executing said mortgage for itself, by and through its proper officers.

And whereas, the board of directors of each of said railroad companies, by resolutions passed for that purpose, have authorized the issue of said bonds to the extent of five millions of dollars, and the execution of mortgages or conveyances in trust by way of
38 mortgage, to secure the payment of said bonds, in terms of the said act of the General Assembly of the State of Georgia.

And whereas, the said three railroad companies hereinbefore named are about to execute, issue and dispose of their joint and several bonds, designated as "seven per cent. mortgage bonds, issued under an act of the legislature of Georgia, approved August 20th, 1872," in a series of five thousand, numbered from 1 to 5,000, inclusive, of one thousand dollars each, to bear even date with these presents, and to be payable on the first day of January, in the year of our Lord, one thousand eight hundred and ninety-three, at the National City Bank of the City of New York, with interest thereon at the rate of seven per cent. per annum, payable on the first days of January and July of each year, which said bonds are to be in the form following, that is to say:

No. —. UNITED STATES OF AMERICA, *State of Georgia.* $1,000.

The Central Railroad and Banking Company of Georgia, the Macon and Western Railroad Company, and the Southwestern Railroad Company of Georgia.

Seven per Cent. Mortgage Bond.

Issued under an act of the legislature of Georgia approved August 20th, 1872.

do hereby acknowledge themselves jointly and severally to owe

and be indebted to Moses Taylor or bearer in the sum of one
39 thousand dollars, lawful money of the United States of America, which said sum the said companies jointly and severally promise to pay to the said Moses Taylor or to the bearer hereof, at the National City Bank of the City of New York, on the first day of January, in the year of our Lord, eighteen hundred and ninety-three, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, the first payment to be made on the first day of January, eighteen hundred and seventy-three, upon the presentation and surrender of the annexed interest warrants as they shall become severally due.

This bond is one of a series of five thousand of a like tenor and date, each for one thousand dollars, in the aggregate amounting to five millions of dollars, which are to be issued from time to time, as the wants of said companies shall require, which said bonds are secured by three separate mortgages, bearing even date herewith, upon all the railroads of said companies which have been or which may hereafter be constructed, subject only to a prior mortgage amounting to one million of dollars.

The holder of this bond may at any time have it registered on the books of the companies, at their office or agency in the city of Savannah, or the city of New York, and such registry shall be endorsed hereon, after which it can only be transferred by the owner on said books in person or by attorney, to bearer, or to person or persons named in such transfer.

In witness whereof, the said Central Railroad and Banking Company of Georgia has caused this bond to be signed on its behalf by its president and cashier, and the said The Macon and West-
40 ern Railroad Company and The Southwestern Railroad Company, each by its president and treasurer; and each of said companies respectively has caused its corporate seal to be hereunto affixed this the first day of October, eighteen hundred and seventy-two.

THE CENTRAL RAILROAD AND BANKING CO. OF GEORGIA,

By —— ——, *Cashier.*

—— ——, *President.*

THE MACON AND WESTERN RAILROAD COMPANY,

By —— ——, *Treasurer.*

—— ——, *President.*

THE SOUTHWESTERN RAILROAD COMPANY,

By —— ——, *Treasurer.*

—— ——, *President.*

Each and every one of said bonds having warrants or coupons attached to the same for the interest to fall due thereon.

And, whereas, the Macon and Western Railroad Company, and the Southwestern Railroad Company, have each executed mortgages, or conveyances in trust by way of mortgage, to secure the payment of said bonds in terms of said act of the General Assembly of the State of Georgia, approved August the 20th, 1872, which mortgages or conveyances in trust bear even date with these presents.

Now, therefore, this indenture, made and entered into this first day of October, one thousand eight hundred and seventy-
41 two, by and between the Macon and Western Railroad Company, a corporation under the laws of the State of Georgia, party of the first part, and the Farmers' Loan and Trust Company of the City of New York, party of the second part, witnesseth,

That the said party of the first part, in consideration of the premises, and of five dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, for the purpose of securing the punctual payment of both the principal and interest and all of said bonds alike. Hath granted, bargained and sold, transferred and conveyed, and by these presents doth grant, bargain and sell, transfer and convey and set over, to the party of the second part, and its successors and assigns, all and singular the railroad of the said party of the first part, lying and being in the State of Georgia, extending from the city of Savannah to the city of Macon, with a branch from the main line to the city of Milledgeville, being in all about two hundred and eight miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description, now held or hereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad, or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said rail-
42 road, and all franchises connected with or relating to the said railroad, or the construction, maintenance or use thereof, now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed or exercised by the said party of the first part, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described, belonging, or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said party of the first part, of, in and to the said property, and every part thereof, with the appurtenances.

To have and to hold the said railroad and all its parts, all and singular, and the said premises, and every part thereof, with the appurtenances, unto the said party of the second part, its successors

and assigns, but upon the following express conditions and trusts—that is to say:

In trust until default shall be made by the said party of the first part in the payment of the principal or interest of the said bonds, or any one or more of them, according to the tenor and effect thereof, to permit the said party of the first part to possess, manage and enjoy the said railroad and every part thereof with its franchises, equipments and appurtenances, and all and singular the property above described and conveyed, and to make and use the tolls, income, rents, issues and profits thereof, in the same manner as if this deed had not been made; and further, if the said party of the first part shall well and truly pay, or cause to be paid, the principal and interest of the said bonds, and every one of them,
43 according to the tenor and effect thereof, and of the coupons attached thereto, then the estate, right, title and interest hereby conveyed, and this indenture and every article and clause herein contained, as well as the said bonds shall cease, determine and be void and the right and title to the premises hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgement of satisfaction, reconveyance, re-entry or other act.

But upon the further express condition and trust, that in case the said The Central Railroad and Banking Company of Georgia, and its co-obligors, shall fail to pay the principal or any part thereof, or any installment of interest, or any part thereof, of any of the said bonds above described, to be issued under and secured by this deed of trust, at any time when and where the same shall become due and payable, according to the tenor and effect thereof, and for sixty days thereafter, it shall be competent and lawful for the said party of the second part, and its successors or assigns, to enter upon the said railroad and premises and property herein described, and every part and parcel thereof, with the appurtenances, and take possession of the same, without let or hindrance of the party of the first part and to appoint an agent to operate and manage the same, and receive the revenues and income thereof, applying the said fund to keep the same in good order and repair, and the surplus to pay the interest and principal of all the bonds which may be outstanding, and secured hereby *pro rata;* or it may apply, in its discretion, to the proper court having jurisdiction of the same, of either the State or the United States, and sitting in the State of Georgia, for the sale thereof, or it may sell the same in the manner hereinafter specified.

44 And upon the request of the holders of one-fifth in amount of the bonds which at any time may be outstanding under this deed of trust, with any part of the principal or interest thereof due and paid, it shall be the duty of the said party of the second part, by its president or agent duly appointed in its behalf, to enter upon and take possession of said railroad and property herein described, and all and singular and each and every part and parcel thereof, and assume its management, until the arrears of both principal and interest shall be paid, or the property sold, as herein pre-

scribed, receiving the rents, revenues and income thereof and applying them in the same manner as above stated, when the said party of the second part enters upon and assumes possession and management of said property without the request of bondholders. And in case the arrears of interest and principal shall not be paid within six months from the time of said request, by the bondholders as above stated, and earlier, in the discretion of said trustee, party of the second part, it shall be the duty of the said party of the second part to institute the proper proceedings in the proper courts, to procure a judgment or decree for the sale of said property and premises, and all and singular every part and parcel thereof. Or the said trustee may cause the same to be sold at public auction, to the highest bidder, at the front door of the court-house in the city of Savannah, first giving three months' notice thereof, before the day of sale, in one of the daily papers published in each of the cities of New York, Savannah, and Macon, stating the time and place of sale, the description of the property to be sold and the terms of sale; and upon such sale being made, the said party of the second part shall execute a deed of the same, which deed shall be a bar
45 against the said party of the first part, its successors and assigns, from and against all claim of the said party of the first part, and all its right of redemption therein, and shall convey full and absolute title therein to the purchaser, free and clear of all incumbrances thereon, and of all claims, rights or equities of the said party of the first part, its successors or assigns, and without any obligation on the purchaser to see to the application of the purchase-money.

And the said party of the second part shall, after deducting from the proceeds of said sale the cost and expenses thereof, and of managing the said property, and enough to indemnify and save itself harmless from all liabilities arising from this trust, apply so much of the proceeds of said sale of said property as may be necessary to the payment *pro rata* of all the interest and principal of said bonds outstanding and unpaid, and shall pay the residue thereof to the party of the first part, its successors or assigns. Being expressly understood and agreed by the said party of the first part, that in no case shall any claim be made under, or any advantage taken of any valuation, appraisement, redemption, or extension law now existing, or hereafter to be enacted by it, its successors or assigns, the benefit of all such laws hereby being expressly waived nor shall any injunction or stay of proceedings be had or applied for nor any process applied for or obtained by it or them, to prevent such entry, or sale or conveyance, as is above provided for and set forth.

It is, however, expressly agreed between the parties to these presents that the said party of the first part may dispose of the current revenues and income of all the said property and railroad hereby conveyed, in such manner as it shall elect, until default shall
46 be made in the payment of the principal or interest of said bonds, or of some one or more of them, and shall have the right to sell and dispose of any such real estate or other property of any description as it may own or acquire, which may not be neces-

sary for the purpose and business of the said line of railroad which said sale and conveyance of such real estate and other property shall transfer the said property and title free from the incumbrance of this mortgage or deed of trust.

And it is also further agreed, and expressly understood, that every bond issued under this mortgage or deed of trust shall be countersigned by the said party of the second part, and certified to be one of the series authorized to be issued and secured by this deed of trust, and no bond shall be valid under this deed, or entitled to its protection and security, unless it shall be so certified.

And it is further provided, agreed and understood, that inasmuch as there are certain bonds now outstanding of the Central Railroad and Banking Company of Georgia, amounting to one million dollars in all, secured by a mortgage or deed of trust, executed by said railroad company, to Moses Taylor and James Robb, both of the city of New York, and bearing date the first day of September in the year one thousand eight hundred and sixty-five, which are to be provided for and paid with and from the proceeds of the bonds hereinbefore described, and which are intended to be secured by this mortgage or deed of trust, so that there shall be no prior incumbrance upon the property and franchises of the said The Central Railroad and Banking Company of Georgia, the cashier of the said last-mentioned company, shall file a list of all the said present outstanding bonds, with the said party of the second part, and also a list of all such bonds now outstanding which may
47 from time to time be paid, in such manner that the said party of the second part shall always have full knowledge of all the bonds of the said The Central Railroad and Banking Company of Georgia, which may be unpaid under former issue; and it shall be the duty of the said party of the second part always to withhold its countersign and certificate from so many of the bonds herein provided for and secured as there shall be bonds of said former issue outstanding, and when all said outstanding bonds shall be paid, then said party of the second part shall, if requested by the said party of the first part, certify and countersign the remainder of the bonds provided for herein, as in other cases.

And it is hereby mutually agreed, that the said party of the second part, its successors in trust, and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agent employed by it or them, when such agent shall have been employed with reasonable discretion and that the said party of the second part, and its successors in the trust, shall be entitled to reasonable compensation for their services in the management of said trust.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant and agree to and with the said party of the second part, its successors and assigns, to execute and deliver any further reasonable and necessary conveyance of the said railroad premises or property, or any further assurance whatever, for the purpose of carrying into effect the objects and purposes of this

indenture, that counsel learned in the law may deem necessary or advisable.

In witness whereof, the said party of the first part has
48 caused its corporate seal, with the signatures of its president and cashier to be hereto affixed, and the said party of the second part has in its corporate name and style, by its president, signed the same and caused its official seal to be appended thereto, and the said party of the first part, by its president, has duly acknowledged the execution of the same before the proper officer to take acknowledgement of deeds in the State of Georgia.

WM. M. WADLEY, *President.*
[SEAL.] T. M. CUNNINGHAM, *Cashier.*
THE FARMERS' LOAN AND TRUST COMPANY,
[SEAL.] By R. G. ROLSTON, *President.*

Attest: GEO. P. FITCH.
EDWIN F. COREY, JR.

Signed, sealed, and delivered in presence of—
J. LAWTON WHATELY,
R. W. ADAMS,
Notary Public, Chatham County,
As to signatures of Wm. M. Wadley and T. M. Cunningham.

STATE OF GEORGIA, }
Chatham County. }

This is to certify that on the first day of October, A. D. 1872, personally appeared before me in said county Wm. M. Wadley,
49 president of the Central Railroad and Banking Company of Georgia, personally known to me, and having made oath that he is such president and that the foregoing deed was made with the authority and under a resolution of the board of directors of said company, and the seal of said company was duly, by said board, authorized to be attached thereto, and that he was authorized and directed to execute the same, acknowledge- that the signature of said company, by himself as president, attested by the cashier, was made thereto on behalf of said company, and the seal of the company thereto appended, and that said signature was his free act and deed and the act and deed of said company, and the seal the seal of said company, and the deed is the deed of said company, made and executed for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] R. W. ADAMS,
Notary Public, Chatham County.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on the fourth day of October, A. D. 1872, before me, Edwin F. Corey, Jr., a commissioner for the State of

Georgia, duly commissioned and qualified, and residing in said city of New York, personally appeared Rosewell G. Rolston, president of the Farmers' Loan and Trust Company, who is personally known to me, and having made oath that he is such president and
50 that the foregoing deed was made with authority and under a resolution of the board of directors of said company, and the seal of said company was duly, by said board, authorized to be attached thereto, and that he was authorized and directed to execute the same, acknowledge- that the signature of said company, by himself as president, attested by the secretary, was made thereto on behalf of said company, and the seal of said company thereto appended, and that said signature was his free act and deed and the act and deed of said company, and the seal the seal of said company, and the deed is the deed of said company, made and executed for the purposes therein named and mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY, JR.,
[SEAL.] *Commissioner for the State of Georgia in New York.*

EXHIBIT "C."

Opinion of Mr. Justice Jackson Overruling Motion for Rehearing.

Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

51 ROWENA M. CLARKE
vs.
THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*

CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA
vs.
THE FARMERS' LOAN AND TRUST COMPANY *et al.*

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*

Consolidated Cases in Equity.

Pending upon rehearing as to the Southwestern Railroad Company and its application for a modification of the decree heretofore passed.

Mr. Justice Jackson sitting as circuit justice.

The general proposition presented on behalf of the Southwestern Railroad Company under its petition for a rehearing is that the decree of the court should direct and provide that the property of

the Georgia Central Railroad Company be first sold and the proceeds thereof applied to the payment of the tripartite bonds before the property of the Southwestern is subjected for that purpose. This claim to have the mortgaged property of the Central first subjected to the payment of the bonds is based upon the following grounds:

(1.) That the Southwestern Railroad Company, although upon the face of the bonds and mortgages a joint obligor and principal debtor, is, in fact, only a surety for the Central Company, its co-obligor, upon whom rests the primary duty of paying the bonds.

(2.) That, being such surety, if required by the decree to pay the bonds or any part thereof, the Southwestern would have the right to be subrogated to the lien of the trustee under tripartite mortgages and to be reimbursed out of the property of the Central
52 Railroad Company covered by its mortgage.

(3.) That in view of this relation of principal and surety between the two companies and in recognition of the Southwestern Company's right to subrogation, if it should be required to pay the mortgage debt or any part thereof, this court should so frame its decree as to require the property of the Central Railroad Company covered by its mortgage to be first sold and exhausted before directing or authorizing the property of the Southwestern Company to be subjected to the payment of the tripartite bonds or any part thereof.

This contention of the Southwestern Railroad Company has been re-examined and considered in the light of the able oral arguments presented on the rehearing and of the carefully prepared briefs of counsel since submitted. It is not deemed necessary, even if the pressure of other duties permitted, to enter upon any review of the history of the litigation and of the facts out of which these questions arise or to go into any extended discussion of the legal principles applicable thereto. It is sufficient to state the conclusions of the court, which are as follows:

(*a*.) The documentary and oral evidence submitted fail to establish the fact that the relation of principal and surety existed between the Central and Southwestern Companies at the time the bonds were issued; nor is it shown that such relation was subsequently created.

1. There was no express agreement between the two companies creating such a relation.

2. It requires a mutual agreement of parties, express or clearly implied, to create such a relation. (Shepherd *v.* May, 155 U. S., 512.)

53 3. The bonds and mortgages upon their face show the Southwestern to be a joint obligor and principal debtor.

4. Under the act of August 20, 1872, the Southwestern Company had the option to become either a joint obligor or a surety by way of endorsement or guaranty of the bonds. It elected, after a discussion of that direct point on the part of the officers, to become a joint principal. There was nothing in its lessor relation to the Central to prevent its assuming such a joint obligation.

5. There is nothing in the terms of the so-called lease of June, 1869, made by the Southwestern Company to the Central Railroad Company inconsistent with the former company being a principal obligor; nor is there anything in the terms of that lease to establish the fact that the Southwestern Company was intended to be only a surety for the Central Company upon the tripartite bonds. Even if that lease is read in the light of the committee's report and of the resolution of the board of directors of the Southwestern Company under date of June 11, 1869, its provisions fail to show any such suretyship relation. The report and resolution of June 11, 1869, have really no bearing upon the case. The resolution of the Central Railroad Company under date of June 22, 1869, shows the only modification which was ever made in the terms of the lease with the assent of the lessee company, and this resolution by its express terms provides that the Central Company will "assume and pay all claims against and obligations of the Southwestern Railroad Company remaining unpaid after the first day of December next." This undertaking to pay debts remaining unpaid at the date the Southwestern Company was to surrender possession to the Central Company is inconsistent with the terms of the leases, which, properly construed, bind the Central only to the payment of
54 debts existing against the Southwestern at the time the lease was executed.

6. The subsequent course of dealing between the parties falls far short of establishing the relation of principal and surety between the two companies. The tripartite bonds were never entered upon the books of the Central as the separate debt of that company. The proceeds of the bonds were used partly in making a dividend in which the stockholders of the Southwestern shared, in making improvements on the Southwestern properties, and for other purposes designed to promote the common interests of both companies by increasing their joint and several earning capacity. While, as stated by a witness, "it is not possible to point out the specific purposes to which the specific proceeds (of the bonds) were applied," it is shown that the Central made expenditures which improved the physical condition of the Southwestern property and increased its productiveness.

Again, the preamble of the act of August 20, 1872, after reciting the purposes for which the bonds were to be issued, and that the Southwestern and the Macon and Western Companies had been leased to the Central, referred to these leases "as thus uniting the interest of the three said railroads."

The contract of June, 1869, between the two companies differed in many respects from an ordinary lease. No rental is reserved to the Southwestern railroad, but the two companies entered into a quasi-consolidation under the management and control of the Central Company, and so united their properties or pooled their earnings as to give them a community of interest in the profits realized from the joint enterprise. Under this union of their properties and interests the Central was to declare and pay semi-annual
55 dividends to the stockholders of the Southwestern in the

proportion of eight to ten of the dividends paid to its own shareholders, with the superadded guaranty that such dividends should never be less than seven per cent. annually. In other words, the two roads were by the contract united in a joint venture with a stipulation that the profits to be derived from their management and operation by the Central should be divided in certain agreed proportions out of the common earnings.

In the creation of this community of interest and joint participation in the profits of both properties the Southwestern or its stockholders had a common interest in whatever directly or indirectly promoted the efficiency or increased the earning capacity of the system with which it had connected itself. This community of property and interest was intended to last through the life of the Southwestern corporation, and the practical result of the contract was the same as if the two companies had been merged or consolidated under an arrangement by which the stockholders of the Southwestern had surrendered their shares in that company and taken in lieu thereof an equal number of shares in the Central, with a guaranty of at least seven per cent. annual dividend, with a right to increased dividends in the proportion of eight to ten of such dividends as might be declared and paid to the original stockholders of the Central. This being the substantial relation of the two companies, the stockholders of the Southwestern had a direct interest in the common earnings of the two companies under the management of the Central, and were therefore indirectly, if not directly, benefited by outlays and improvements made upon the Southwestern road for the purpose of increasing its earning capacity, although such improvements may not have constituted permanent betterments; so that, aside from the dividends declared out of the proceeds of a portion of the bonds, the Southwestern Railroad Company or its stockholders derived benefits indirect, if not direct, from the expenditures made by the Central on the property of the Southwestern. It is not a matter of any consequence whether the expenditures were made from the specific proceeds of the bonds or from the common fund of the Central into which such proceeds as well as all earnings of the Central Company went.

56

The case of Ridgeway Smith *vs.* Central Railroad Company, in the superior court of Chatham county, Georgia, had no bearing upon the question under consideration. The Southwestern Company was not a party to that proceeding, which did not involve the question as to its relation to the Central; nor did the decision of the court in that case undertake to decide or actually determine anything upon that question.

(*b.*) But if the suretyship of the Southwestern were established there could be no subrogation in the present attitude of the case under either the general principles of equity or the law of Georgia, because the Southwestern has not paid the mortgage debt or any part thereof. Where the debt is due and the creditor is inactive the surety may, under some circumstances, bring both the creditor and debtor before a court of equity and require the creditor to proceed against his debtor, or to compel the latter to exonerate him by

paying the debt; but in such cases he must make or tender indemnity and show some special equity as the ground for such relief. Where the creditor is himself active the surety can claim no subrogation to the creditor's security until he has paid the debt and paid it in full.

57 (Ætna Life Ins. Co. *v.* Middleport, 124 U. S., 534; Gilliam *v.* Esselman, 5 Sneed (Tenn.), 86; Graff & Company's Estate, 139 Penn. St., 75; Sheldon on Sub., sec. 127, and authorities cited; Necomb *v.* Hall, 90 N. Y., 327; Evart *v.* Latta, 4 McQ., H. L. C., 986.)

In this last-cited case it was well said by Lord Westbury that "the surety has a right, in certain cases where the nature of his obligation as surety is perfectly clear upon the face of the instrument, to call upon the creditor to resort first to the principal debtor for payment of the demand. * * * So also, under certain circumstances, when he has paid the debt and satisfied his obligation, he is entitled to stand in the shoes of the creditor and has all the rights of the creditor as against the principal debtor." The Southwestern Company shows no right to subrogation, because it has not paid the tripartite bonds, nor is the fact of its suretyship on those bonds clear either upon the face of the instrument or from the proof that has been introduced. It is therefore not entitled to the relief it seeks, and the Georgia statutes relied on by counsel for the Southwestern do not change these general principles.

(*c*.) If the evidence now produced was sufficient to establish the fact that the Southwestern Railroad Company occupied the position of surety as between itself and the Central Company, the question would still arise whether such suretyship would entitle it to the relief sought as against the Central Trust Company and the holders of bonds represented by it, whose rights had intervened before such claims of suretyship was even asserted on the part of the Southwestern.

The right of subrogation is one of purely equitable origin and nature, and its operation is not that of an absolute right without limitation, but is controlled, like other equitable rights, by

58 equitable principles. It should never be enforced so as to defeat or interfere with the superior or equal equities of third persons or with the legal rights of third persons growing out of express contracts.

The Central Trust Company and the bondholders represented by it have an undoubted equity to redeem the prior mortgage to the Farmers' Loan and Trust Company and be substituted to the rights and liens of that mortgage. The decree sought by the Southwestern would interfere with and defeat that equity of the Central Trust Company, but, aside from this, the right to relief sought by the Southwestern by way of subrogation or by compelling the trustee of the tripartite bonds to first exhaust the Central before coming upon its mortgaged property is an equity which cannot be enforced against intervening rights which have been acquired without notice of such suretyship.

The facts in this case do not show that the Central Trust Com-

pany, the trustee under the consolidated mortgage, had any notice of the Southwestern's alleged suretyship. It had notice of the act of August 20, 1872, of the tripartite bonds, of the three mortgages made to secure the same, and of the lease of 1869, made by the Southwestern to the Central; but these documents no more effected the Trust Company with notice that the Southwestern was a surety for the Central on the bonds than they did the Farmers' Loan and Trust Company.

It is conceded that the Farmers' Loan and Trust Company and the bondholders represented by it have a right to treat the Southwestern as a joint principal by what appears on the face of these papers, and that *that* as to the Farmers' Loan and Trust Company the Southwestern cannot question that liability. If so, it is not perceived how the Central Trust Company can from the
59 same documents be put upon notice that the Southwestern was only a surety; nor is there anything in the recitals of the consolidated mortgage made to the Central Trust Company in April, 1890, which in any way tends to show that the Southwestern was a surety for the Central. Under the provisions of the consolidated mortgage five millions of the consolidated bonds were placed in the hands of the trustee, which were not to be surrendered or delivered until an equal amount of tripartite bonds were turned over to it. The holders of the tripartite bonds could have compelled a transfer at any time after the consolidated bonds were issued, but neither the trustee nor the Central Railroad Company could compel any tripartite bondholder to accept as a substitute for his bonds a like number of the consolidated bonds. That provision in the consolidated mortgage in no way establishes the fact that the Central was the primary debtor of the tripartite bonds; neither does it show that if the tripartite bonds to the amount of five millions had been surrendered for the consolidated bonds the Central Company would not have had the right to charge one-third of the amount thereof against the Southwestern. That reservation of five millions of the consolidated bonds was not to confer additional security for the payment of the tripartite bonds. Like provisions contained in the other subsequent mortgages have been before the courts and have received no such construction as that the Southwestern contends for. (Wabash, St. L. & Pac. R. R. Co. *vs.* Ham., 114 U. S., 597; Meyer *vs.* Johnston, 53 Ala., 236.)

That provision of the consolidated mortgage in no way operated as an admission that the Central Company was the primary debtor on the tripartite bonds which it proposed to take up with
60 the five millions of consolidated bonds.

The Central Trust Company not being effected with any notice of the alleged suretyship of the Southwestern, any equity arising out of such suretyship, if it actually existed, could not be enforced against the intervening right of the Central Trust Company and the bonds represented by it which have been negotiated. We think the proposition is established both upon principle and authority. Among other authorities, Orvis *vs.* Newell (17 Conn., 97), Bryan *vs.* Henderson (88 Tenn., 29), Harner's Appeal (94 Penn.

St., 489), Miller *vs.* Stout (5 Del. Ch., 259), Gerdine *vs.* Menage (41 Minn., 417, 422), Thomas *vs.* Stewart (117 Ill., 50), Smith *vs.* Harding (124 Ind., 434), Rand *vs.* Cutler (29 N. E. Rep., 1085), Alleghany V. R. R. Co. *vs.* Dickey (131 Penn. St., 86, 96, 97), Ahern *vs.* Freeman (Minn.) (48 N. W. Rep., 677, 678).

In no view that can be taken of the case is the Southwestern entitled to the relief which it seeks. Its petition for rehearing is dismissed and the decree will stand as heretofore passed, charging it with its proportionate share of the tripartite bonds.

61 EXHIBIT "D."

Decree for Foreclosure and Sale.

Circuit Court of the United States, Eastern Division, Southern District of Georgia.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *vs.* THE FARMERS' LOAN AND TRUST COMPANY *et al.*	Consolidated Cause.
THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*	
ALEXANDER BROWN & SONS *vs.* THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*	

Decree of foreclosure and sale, January 4, 1894.

Turner, McClure & Rolston, 22 William street, New York; George A. Mercer & Son, Savannah, Ga., attorneys for the Farmers' Loan and Trust Company.

At a term of the circuit court of the United States for the eastern division of the southern district of Georgia, held at the
62 city of Savannah on the 4th day of January, 1894.

Present: The Hon. Howell E. Jackson, circuit justice, and the Hon. Emory Speer, district judge.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA
vs.
THE FARMERS' LOAN AND TRUST COMPANY *et al.*

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*

ALEXANDER BROWN & SONS
vs.
THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *et al.*

Consolidated Cause.

These causes, having heretofore been consolidated for trial, came on to be heard at this term upon the pleadings and proofs and, all parties being represented by counsel, were fully argued, and thereupon, upon consideration of the equities of the Farmers' Loan and Trust Company, as set out in its bill herein, the court finds and adjudges that the material facts of the said bill are true as therein set forth, and that the said complainant is entitled to the relief therein prayed, and thereupon—

It was ordered, adjudged, and decreed that the mortgage set forth in the bill of complaint filed herein by the Farmers' Loan and Trust Company, trustee, made by the defendant The Central
63 Railroad and Banking Company of Georgia to the said The Farmers' Loan and Trust Company, bearing date the first day of October, 1872, is a valid and subsisting mortgage and constitutes a first lien upon the mortgaged premises, property, and franchises described in said property as follows (the words "party of the first part" referring to the Central Railroad and Banking Company of Georgia and the words "party of the second part" referring to the Farmers' Loan and Trust Company):

"All and singular the railroad of the said party of the first part lying and being in the State of Georgia extending from the city of Savannah to the city of Macon, with a branch from the main line to the city of Milledgeville, being in all about two hundred and eight miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts, and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description now held or hereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment, and all machinery, tools, implements, fuel, and materials for the constructing, operating, and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and

all franchises connecting with or relating to the said railroad or the construction, maintenance, or use thereof now held or hereafter acquired, and all corporate and other franchises which are now
64 or hereafter may be acquired, possessed, or exercised by the said party of the first part, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said party of the first part of, in, and to the said property and every part thereof, with the appurtenances."

It was further ordered, adjudged, and decreed that the mortgage set forth in the said bill of complaint of the Farmers' Loan and Trust Company, trustee, made by the defendant The Southwestern Railroad Company to the said The Farmers' Loan and Trust Company, bearing date the first day of October, 1872, is a valid and subsisting mortgage and constitutes a first lien upon the mortgaged premises, property, and franchises described in said mortgage as follows (the words "party of the first part" referring to the Southwestern Railroad Company and the words "party of the second part" referring to the Farmers' Loan and Trust Company):

"All and singular the railroad of the said party of the first part, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the cities of Columbus, Eufaula, Ft. Gaines, and Albany respectively, in all two hundred and fifty-seven miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts, and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description now held or hereafter acquired,
65 including all locomotives, tenders, cars, and other rolling stock or equipment and all machinery, tools, implements, fuel, and materials for the constructing, operating, and repairing the said railroad or any part thereof or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance, or use thereof now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed, or exercised by the said party of the first part, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said party of the first part of, in, and to the said property and every part thereof, with the appurtenances."

It was further ordered, adjudged, and decreed that the mortgage set forth in the said bill of complaint of the Farmers' Loan and Trust Company, trustee, made by the Macon and Western Railroad

Company to the said The Farmers' Loan and Trust Company, bearing date the first day of October, 1872, is a valid and subsisting mortgage and constitutes a first lien upon the mortgaged premises, property, and franchises described in said mortgage as follows (the words "party of the first part" referring to the Macon and Western Railroad Company and the words "party of the second part" referring to the Farmers' Loan and Trust Company):

66 "All and singular the railroad of the party of the first part lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the city of Atlanta, being one hundred and three miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds, and other lands, bridges, viaducts, culverts, and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property, of every description, now held or hereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment, and all machinery, tools, implements, fuel, and materials for the construction, operating, and repairing the said railroad or any part thereof or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance, or use thereof now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed, or exercised by the said party of the first part, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said party of the first part of, in, and to the said property and every part thereof, with the appurtenances."

And, further, that after the execution and delivery of said last-mentioned mortgage the said Macon and Western Railroad Company was consolidated with and merged into the Central

67 Railroad and Banking Company of Georgia, which last-named corporation has ever since been the owner of said property.

It was also ordered, adjudged, and decreed that the lien of said mortgages and each of them upon the property therein described respectively, including leasehold interests, extensions, additions, and after-acquired property and income therefrom (but not upon shares of stock or bonds of other corporations at any time owned or held by the Central Railroad and Banking Company of Georgia or upon any shares of stock or bonds mentioned and included in the collateral trust mortgage of May 2d, 1887, to the Central Trust Company of New York, trustee), is prior to any other lien in favor of any party to any of the causes above mentioned; that default has been made, as hereinafter specified, in the payment of both

principal and interest due upon the bonds secured by said mortgages and each of them, so that the Farmers' Loan and Trust Company, as trustee, is entitled to a sale of said mortgaged property, premises, and franchises, unless the said defendant mortgagor companies shall pay or cause to be paid, as hereinafter directed, the amount of the entire bonded indebtedness secured by said mortgages, with all costs and expenses of the suit wherein The Farmers' Loan and Trust Company, as trustee, is complainant, as hereinafter specified; that there are jointly and severally secured by the liens of the said mortgages the following amounts of bonds and coupons, with interest thereon, the said bonds and coupons being the joint and several bonds and coupons of the said three mortgagor companies, which bonds and coupons were lawfully issued by said companies and are the joint and several subsisting obligations of said mortgagor companies, to wit:

68 (1.) The amount of $4,999,000 for the principal of said bonds, which became due and payable on the first day of January, 1893, with interest on said amount at the rate of seven per cent. per annum from the said first day of January, 1893.

(2.) The amount of $174,965 for coupons due July 1st, 1892, with interest on said amount of said coupons at the rate of seven per cent. per annum from said date. Also,

(3.) The amount of $174,965 for coupons due January 1st, 1893, with interest thereon at seven per cent. per annum from that date; so that the entire sum due for principal and interest on the said bonds and unpaid coupons up to the 29th day of June, 1893, is the sum of five million five hundred and forty-one thousand two hundred and twenty-six dollars and twenty-five cents ($5,541,226.25), and the sum of five million three hundred and forty-eight thousand nine hundred and thirty dollars ($5,348,930) shall bear interest at seven per cent. per annum from June 29th, 1893, until paid and discharged.

It was further ordered, adjudged, and decreed that the mortgage or deed of trust set forth in the answer of the defendant The Central Trust Company of New York to the bill of complaint herein, bearing date April 1, 1890, securing payment of the consolidated first-mortgage five per cent. gold bonds of the Central Railroad and Banking Company of Georgia (which are outstanding to the amount of $8,000,000 of principal, par value), is a valid and subsisting mortgage and constitutes a lien to the extent of the amount which shall be ascertained in the manner hereinafter provided to be owing upon the said bonds and the coupons thereunto appertaining to the amount of the debts for the payment of which said bonds were hypothecated next after the lien of the mortgages

69 to the Farmers' Loan and Trust Company, upon the property and premises of the Central Railroad and Banking Company of Georgia, described therein as follows:

"All the right, title, and interest of the said Central Railroad and Banking Company of Georgia in and to all its certain lines of railroad lying and being in the State of Georgia and now built and in

operation, as follows: Commencing at the initial point of said line of railroad of said railroad and banking company, in the city of Savannah, in the county of Chatham, State of Georgia, and running thence in a northerly and northwesterly direction through the counties of Chatham, Effingham, Screven, Burke, Jefferson, Washington, Wilkinson, Jones, Bibb, Monroe, Pike, Spalding, Henry, Clayton, and Fulton, in said State of Georgia, to the terminal point of said line of railroad in the city of Atlanta, in said county of Fulton; and also commencing in the town of Gordon, in said county of Wilkinson, at a connection with the line of railroad of said railroad and banking company above described and running thence in a northerly direction through the counties of Wilkinson and Baldwin to its terminal point in the city of Milledgeville, in said county of Baldwin, together with all the estate, right, title, and interest of said railroad and banking company of, in, and to the said lines of railroad and every part and parcel thereof, including all rights of way, road-bed, superstructure, tracks, bridges, trestles, viaducts, side tracks, switches, switching apparatus, turn-tables, water tanks, and signalling apparatus, all terminal facilities of every character, wharves, warehouses, depot grounds, yards, stations, station-houses, engine-houses, coaling stations, and machine shops and repair shops, cars, rolling stock and tools, machinery, materials, supplies, and other equipment now held, owned, or acquired by it or which it may hereafter acquire for use in connection with said lines of railroad or either of them."

Leave is given to the Central Trust Company of New York to file a cross-bill to foreclose the said mortgage, to which the said Central Railroad and Banking Company shall within twenty days thereafter file its answer, and such cross-bill and answer are hereby referred to George W. Owens, Esq., as master, to ascertain and report to the court, in order to enable it to render a supplemental decree herein, the amount owing as aforesaid upon the bonds and coupons secured by said consolidated first mortgage (being the amount for which said bonds are hypothecated) and to whom payable, such report to be filed on or before the first day of March, 1894.

And it was adjudged that it be referred to George W. Owens, Esq., as master, to ascertain and report to this court, on or before the first day of March, 1894, what after-acquired property, engines, cars, equipment, rolling stock, supplies, and materials are in the possession of the receiver herein and to what particular corporation or line of railway the same belong or are appurtenant, to the end that the equipment, supplies, material, and appurtenances belonging to each separate parcel may be sold together with and as a part of said mortgaged parcel when offered for sale. Such master shall report as to the earnings and expenses of the several railroads or divisions and what has been done with the net income and the amount chargeable to each such railroad or division for deficit in such income account.

It was further ordered, adjudged, and decreed that the said

defendant The Central Railroad and Banking Company of
71 Georgia is insolvent and unable to pay its debts and liabilities.

It is further ordered, adjudged, and decreed that unless the parties defendant to said suit of the Farmers' Loan and Trust Company or some of them shall on or before the first day of July, 1894, pay to the said The Farmers' Loan and Trust Company, as trustee, in New York city, the following sums, namely, first, a sufficient sum of money to pay the costs of the said The Farmers' Loan and Trust Company as they shall be taxed and its compensation as trustee, with such counsel fees and other expenses and disbursements as may be fixed and allowed by the court as entitled to a priority over said mortgage debt, and, second, the entire sum due for principal and interest and interest on unpaid coupons, as hereinbefore fixed and determined, then the said mortgages, premises, and property shall be sold as hereinafter directed and without appraisement or right of redemption, and all the right and equity of redemption of the defendants in said causes, and each and all of them, of, in, and to the said mortgaged premises, property, rights, assets, and franchises, and every part and parcel thereof, shall be forever barred and foreclosed.

It was further ordered and decreed that if the Central Railroad and Banking Company of Georgia shall fail to pay or cause to be paid to the Farmers' Loan and Trust Company on or before the first day of July, 1894, the amounts found herein to be due and to be paid to said trustee on or before the first day of July, 1894, together with costs, expenses, and allowances, then and in that event any other party to the consolidated causes hereinbefore stated at the caption of this decree may, prior to the sale of said property
72 and franchises of said The Central Railroad and Banking Company of Georgia, described as subject to the lien of said mortgages as herein decreed, pay to the Farmers' Loan and Trust Company the amounts herein found to be due to it in respect to said bonds and mortgages, and shall thereupon become subrogated to all of the rights of the said bondholders and of said Farmers' Loan — Company as trustee under this decree. Said trust company shall pay over to the respective bondholders the amounts due upon them only upon receipt of their respective bonds and coupons — shall be transferred and be delivered when received by said trustee to the party making such payment, and upon such payment being made to said trustee the sale of the property and franchises of the said Central Railroad and Banking Company of Georgia and of said Southwestern Railroad Company, or of either of said companies so subject to the lien of said mortgages, shall be stayed until the further order of the court.

It was further ordered, adjudged, and decreed that if default be made in making either of said payments to the Farmers' Loan and Trust Company on or before said first day of July, 1894, then all of said mortgaged premises and property, real, personal, and mixed, rights and franchises, wherever situated, shall be sold as hereinafter provided and without any appraisal or right of redemption at

public auction, to the highest bidder therefor, at 12 o'clock noon, on the premises—that is to say, at the depot or station-house of the Central Railroad and Banking Company of Georgia, in the city of Macon, in the county of Bibb, in the State of Georgia—on a day to be named by the master commissioner herein appointed in
73 his notice of sale; that before making said sale the master commissioner shall publish a notice thereof once in each week for eight weeks in two newspapers published in the city of New York and in one newspaper published in each of the following cities, to wit, Savannah, Atlanta, and Macon, in the State of Georgia, and Montgomery, in the State of Alabama.

And, further, that the master commissioner making such sale may either personally or by some person to be designated by him to act in his name and by his authority adjourn the sale from time to time without further advertisement, but only on the request of the said The Farmers' Loan and Trust Company, as trustee, or its solicitors, or by order of the court or a judge thereof, and on such request or order he shall make such adjournment.

It is further ordered, adjudged, and decreed that each purchaser of a parcel of the property, when the same is struck down to him, shall at once pay to the master commissioner on account of his purchase the sum of fifty thousand dollars, which shall at once be deposited by him in the depository of this court, subject to the order of the court in this cause, except that a purchaser of the entire property, when offered as a unit, shall so pay one hundred thousand dollars, and a purchaser of one or more leasehold interests or of a parcel of rolling stock shall pay twenty-five per cent. of the amount of his bid, all payments to be made in cash or certified checks; that should any purchaser fail to make such payment at once the mortgaged property and premises struck down to him shall be resold, the court reserving the right to consider such resale as made on account of said proposed purchaser or as an original sale,
74 but that such sale under such circumstances shall be made at once and without further advertisement, and that the payment or deposit received from the successful bidder shall be applied on account of the purchase price, and that such further portions of the purchase price shall be paid in cash as the court may from time to time direct, the court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its, or their successors or assigns, to comply within twenty days with any order of the court in that regard, and that the balance of the purchase price may be paid either in money or in bonds or overdue coupons secured by said mortgages of said defendant mortgagor companies to the said The Farmers' Loan and Trust Company and bonds or overdue coupons secured by said consolidated first mortgage to the Central Trust Company of New York, each of said bond or coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered and according to the priority herein adjudged.

It was further ordered that George W. Owens, Esq., be, and he

hereby is, designated and appointed a master commissioner to make the sale hereby ordered and decreed and to execute and deliver a deed or deeds of conveyance of the property so to be sold to the purchaser or purchasers thereof on the further order of the court or of the judge thereof confirming such sale, the court, however, reserving the right, in term time or chambers, to appoint another person such master commissioner, with like powers, in case of the death or disability to act of the master commissioner hereby
75 designated or in case of his resignation or failure to act or removal by the court, without prejudice to the proceedings theretofore had by him.

It was further ordered and decreed that within sixty days from the confirmation of said sale or sales, and such additional time as the court may hereafter grant, the purchaser or purchasers of said property shall complete the payment of the entire amount bid to the said master commissioner, and that on such payment the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the said master commissioner and from other parties, as herein provided, and to receive possession of the property so purchased from the parties holding possession of the same.

It was further ordered and decreed that the funds arising from such sale shall be applied as follows:

1. To the payment of all proper expenses attendant upon said sale, including the expense, outlays, and compensation of the master commissioner to make said sale as such expenses, outlays, and compensation may be hereafter fixed and allowed.

2. To the payment of taxes on the property, such indebtedness of the receiver, and such preferential claims and liabilities as the *the* court may charge as liens upon the said mortgaged property or any part thereof as prior to the liens of the said mortgages to the Farmers' Loan and Trust Company as trustee.

3. To the payment of the costs of said suit of the Farmers' Loan and Trust Company as trustee and the compensation of the Farmers' Loan and Trust Company for its services, charges, and expenses in the execution of its trust under said mortgages so made to it as aforesaid and such solicitors' and counsel fees and other ex-
76 penses and disbursements as may be fixed and allowed by this court as entitled to priority over said mortgage debt.

4. To the payment of the said bonds and coupons of the defendant mortgagor corporations secured by the said mortgages foreclosed in said cause of the Farmers' Loan and Trust Company as trustee to the amount hereinbefore specified, with interest, or, if the fund be not sufficient to pay the same, then to the payment of the same *pro rata*; that each of the said bonds shall be presented for payment to the said master commissioner and shall, if the holder thereof so request, be stamped or endorsed in some way by said master commissioner so as to show the amount that has been paid on account of the same and on account of the coupon interest due thereon, and be returned so stamped or endorsed to the holder thereof; that in case of payment in full of said bonds and coupons, with interest thereon, the same shall be delivered, with payment in

full stamped thereon by the master commissioner, to the purchaser or purchasers at the sale to be held by said purchaser or purchasers as a muniment of title; and

5. If, after making all the above payments, there shall be any surplus, so much of said surplus as shall result from the sale of the property covered by and embraced in said consolidated mortgage shall be applied to the payment of the amounts which shall be found to be owing upon the bonds and coupons secured by said last-mentioned mortgage. Any other surplus arising shall be paid according to the further order of the court in that regard. All questions as to the compensation of the Central Trust Company of New York for its services, charges, expenses, counsel fees, and disbursements arising in the execution of its trust under its
77 said mortgage are reserved for further adjudication in such decree as may hereafter be rendered foreclosing such mortgage.

And, further, that in case there shall be any deficiency in the amount required to be paid in full of the said several amounts directed and allowed to be paid to said Farmers' Loan and Trust Company, then the said master commissioner shall report to the court the amount of the deficiency, and the Farmers' Loan and Trust Company, as trustee, shall have judgment against the said defendants, The Central Railroad and Banking Company of Georgia and The Southwestern Railroad Company, for the amount due and shall have execution therefor, pursuant to the rules and practice of this court.

It was further ordered and decreed that the property and premises so ordered to be sold as aforesaid be offered for sale by the master commissioner in the following manner: That is to say, that he shall first offer separately for sale all the locomotives, engines, cars, and other equipment and rolling stock belonging to the Central Railroad and Banking Company of Georgia in lots of five engines and one hundred cars; that he next separately offer for sale the railroad, rights, properties, and franchises of the Central Railroad and Banking Company of Georgia, being its line of road from Savannah to Atlanta, with all its appurtenances, franchises, and supplies; that he next offer for sale each leasehold interest of the Central Railroad and Banking Company of Georgia hereinafter described; that he next separately offer for sale the railroad, rights, properties, and franchises of the Southwestern Railroad Company, as described in and covered by its mortgage hereinabove referred to. If the bid received for the property of the Southwestern
78 Railroad Company, when offered separately, shall exceed one-third of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against it, and the separate bids received for the equipment, railroad, and leasehold interests of the Central Railroad and Banking Company of Georgia, when offered separately, shall exceed in the aggregate the other two-thirds of such amount of the

indebtedness to said trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia, then the property of the Southwestern Railroad Company shall be struck off and sold to the separate bidder therefor, and thereupon the entire railroad, property, equipment, and leasehold interests of the Central Railroad and Banking Company of Georgia shall then be offered for sale as a single parcel. If the bid for the whole property of the Central Railroad and Banking Company of Georgia, offered as a single parcel, shall exceed the aggregate of the separate bids for its equipment, railroad, and leasehold interests when offered separately, then such bid for the property as a single parcel shall be accepted and the property struck off and sold to the bidder therefor; but if the separate bids for such property, when offered in separate parcels, shall in the aggregate exceed the bid therefor when offered as a single parcel, then the said bids for the property as separate parcels shall be accepted and the property struck off and sold to the separate bidders therefor.

If the bid received for the property of the Southwestern
79 Railroad Company, when offered separately, shall not exceed one-third of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court aforesaid as the court shall hold to be chargeable against it, and the separate bids received for the equipment, railroad, and leasehold interests of the Central Railroad and Banking Company of Georgia, when offered separately, shall not exceed in the aggregate the other two-thirds of such amount of the indebtedness to said trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia, then all the railroad, equipment and leasehold interests, franchises and appurtenances of the Central Railroad and Banking Company of Georgia and the railroad, appurtenances, and franchises of the Southwestern Railroad Company shall be offered and sold in one parcel, and the net proceeds thereof, after payment of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses, and such portions of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia and against said Southwestern Railroad Company respectively, shall be divided between the said two railroad companies in proportion to the amounts bid separately for the properties of the said two companies when put up in parcels. If the bid on the properties of the two railroad companies when thus offered as a single parcel
80 shall not exceed the aggregate amount of the separate bids for the several properties, then the properties shall be struck off and sold to the separate bidders respectively.

It was further ordered and decreed that the Southwestern Railroad Company, anything herein contained to the contrary notwithstanding, shall any time prior to the sale of its property have the right to pay to the complainant, The Farmers' Loan and Trust Company, one-third of the amount herein decreed to be paid to it, including the portion of all costs, expenses, receiver's indebtedness, and preferential charges which shall be decreed to be paid by the Southwestern Railroad Company, and on such payment being made none of the property or franchise of the said Southwestern Railroad Company shall be sold under the provisions of this decree until and unless the sale of the other properties herein ordered to be sold shall be made, and after such sale there shall prove to be a deficiency in the payment of the remaining two-thirds of the amounts herein found to be due to the Farmers' Loan and Trust Company, and then and in such case the said property of the Southwestern Railroad Company shall be liable to sale for the payment of such deficiency, and unless within sixty days after the amount of said deficiency shall be ascertained and demanded in writing of said Southwestern Railroad Company by said master commissioner the said amount of said deficiency shall be duly paid to said The Farmers' Loan and Trust Company, then the said master commissioner shall proceed to advertise and sell the said property of said Southwestern Railroad Company in the same manner as hereinbefore directed for the sale of the said several properties.

81 It was further ordered and decreed that on such sale, confirmation, and conveyance the equity of redemption of each and every of said mortgages and all persons claiming by and under them be forever barred and foreclosed, the defendants The Central Railroad and Banking Company of Georgia and The Southwestern Railroad Company and the complainant, The Farmers' Loan and Trust Company, be, and they are hereby, authorized and directed to execute and deliver, under the direction of the master commissioner, conveyances executed by them, respectively, by way of confirmation and further assurance of the title of the said purchaser or purchasers, his, its, or their assigns, of and to all and singular the mortgaged property and premises and every part and parcel thereof, of every kind and description, wherever situated, hereby directed to be sold by the master commissioner, and that the form of said conveyance and mode of execution thereof shall be settled and approved by the master commissioner or by the court or a judge thereof, if any question should arise as to the form and sufficiency thereof, and that such conveyance shall be delivered to said purchaser or purchasers, his, its, or their assigns, contemporaneously with the deed or deeds of the master commissioner, and on the exhibition of any such conveyance by the master commissioner the receiver of this court shall yield possession to the purchaser of all property described in such deed.

The following is a description of the mortgaged premises herein and hereby ordered to be sold without appraisal or right of redemption:

All and singular the railroad of the Central Railroad and Bank-

ing Company of Georgia lying and being in the State of Georgia,
extending from the city of Savannah to the city of Macon,
82 with a branch from the main line to the city of Milledgeville,
being in all about two hundred and eight miles in length, exclusive of turnouts, with all the railways or extensions or additions constructed on or before October 1, 1872, or thereafter constructed, purchased, or owned, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts, and other structures, all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description held October 1, 1872, or thereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment, and all machinery, tools, implements, fuel, and materials for the constructing, operating, and repairing the said railroad or any part thereof or any of its equipments or appurtenances, whether held October 1, 1872, or thereafter acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance, or use thereof held October 1, 1872, or thereafter acquired, and all corporate and other franchises which were, on or before October 1, 1872, or thereafter, acquired, possessed, or exercised by the said Central Railroad and Banking Company of Georgia, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said Central Railroad and Banking Company of Georgia of, in, and to the said property and every part thereof, with the appurtenances.

And also:

All and singular the railroad formerly of the Macon and
83 Western Railroad Company, now consolidated with and forming part of the Central Railroad and Banking Company of Georgia, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the city of Atlanta, being one hundred and three miles in length, exclusive of turnouts, with all the railways constructed on or before October 1, 1872, or thereafter constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts, and other structures; all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description held by said Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company or its grantees or the said Central Railroad and Banking Company of Georgia, including all locomotives, tenders, cars, and other rolling stock or equipment, and all machinery, tools, implements, fuel, and materials for the constructing, operating, and repairing the said railroad or any part thereof or any of its equipments or appurtenances, whether held by the Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company or its grantees or by the Central Railroad and Banking Company of

Georgia, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance, or use thereof held by the Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company or its grantees or by the Central Railroad and Banking Company of Georgia, and all corporate and other franchises which were, on October 1, 1872, or thereafter, acquired, possessed, or exercised by
the said Macon and Western Railroad Company or its
84 grantees or the said Central Railroad and Banking Company
of Georgia, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said Macon and Western Railroad Company and the said Central Railroad and Banking Company of Georgia of, in, and to the said property and every part thereof, with the appurtenances.

And also all and singular the railroad of the Southwestern Railroad Company, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the cities of Columbus, Eufaula, Fort Gaines, and Albany, respectively, in all two hundred and fifty-seven miles or thereabouts in length, exclusive of turnouts, and also including the branch or extended line to Blakeley, and thence across the Chattahoochee river to the town of Columbia, in Henry county, in the State of Alabama, and also the branch from Fort Valley to Perry, Georgia, and all other extensions and branches, including all the railways constructed on October 1, 1872, or thereafter constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts, and other structures; all depots, station-houses, engine-houses, car-houses, machine shops and other shops and buildings, and all other property of every description held October 1, 1872, or thereafter acquired, including all locomotives, tenders, cars, and other rolling stock or equipment, and all machinery, tools, implements, fuel, and materials for the constructing, operating, and repairing the said railroad or any part thereof or any of its equipments or
appurtenances, whether held October 1, 1872, or thereafter
85 acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance, or use thereof held October 1, 1872, or thereafter acquired, and all corporate and other franchises which were, on or before October 1, 1872, or thereafter, acquired, possessed, or exercised by the said Southwestern Railroad Company of Georgia, and all the income, rents, and revenues arising from the same, together with all the rights, members, and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, at law or in equity, of the said Southwestern Railroad Com-

pany of Georgia of, in, and to the said property and every part thereof, with the appurtenances.

Also the following property owned by the Central Railroad and Banking Company of Georgia, which is included in the property above described, all of which is subject to the lien of the said mortgages to the Farmers' Loan and Trust Company: One undivided one-half interest of the Central Railroad and Banking Company of Georgia in and to a certain lease of the Macon and Northern Railroad Company, extending from the city of Macon, Ga., to the city of Athens, Ga., and also the undivided half interest of said railroad and banking company in the lease made by the Georgia Railroad Company to William M. Wadley, dated May 7th, 1881, and by him assigned to the Central Railroad and Banking Company of Georgia June 1, 1881; also

The leasehold interest of the Central Railroad and Banking Company of Georgia in the Southwestern railroad, extending from Macon, Georgia, to Columbus, Georgia; from Fort Valley, Georgia, via Albany, to Columbia, Alabama; from Smithville, Georgia,
86 to Eufaula, Alabama; from Cuthbert, Georgia, to Fort Gaines, Georgia; from Fort Valley, Georgia, to Perry, Georgia, said lease being dated June 24th, 1869; also

The leasehold interest of the Central Railroad and Banking Company of Georgia in the Augusta and Savannah railroad, extending from the town of Millen to the city of Augusta, said lease being dated May 1st, 1862; also

The leasehold interest of the Central Railroad and Banking Company of Georgia in and to a certain lease of the Eatonton Branch railroad, extending from Milledgeville, Georgia, to Eatonton, Georgia, said lease being dated April 1st, 1853; also

The leasehold interest of the Central Railroad and Banking Company of Georgia in the Mobile and Girard railroad, extending from the city of Columbus, Georgia, to the city of Troy, Alabama, and the- southwestward from Troy in the direction of Mobile or Pensacola, said lease being dated September 10th, 1886.

It was further adjudged and decreed that it be referred to George W. Owens, Esq., as master, to ascertain and report to this court with the evidence taken thereon the nature, amount, and description of any bonds, stocks, and any other assets or property, real and personal, owned by said Central Railroad and Banking Company of Georgia, not covered by the lien of the mortgage of the Farmers' Loan and Trust Company aforesaid, and, if the same are held in trust or otherwise hypothecated, pledged, or mortgaged, the nature, deed, and the amount of the charges thereon and the interest as well as the ownership thereof, and any and all other matters relating thereto. Said report shall also find which of said
87 stocks and bonds constitute a majority vote in the companies owning any of the railroads, steamship lines, or other properties composing the system of said Central Railroad and Banking Company of Georgia, and shall also show what is so controlled by the Central Railroad and Banking Company of Georgia and its in-

terest in each, to the end that said report of the master may be acted upon by this court according to the rules of practice in equity.

It was further ordered and decreed that, at the same time and place when and where said properties covered by said mortgages are sold, said master commissioner shall offer for sale all of the right, title, and interest of said Central Railroad and Banking Company of Georgia in each class of said stocks and bonds and real and personal property, said sale to take place under such terms as the court shall hereafter by supplemental decree direct, such sales to be advertised at the same time, in the same manner, and for the same period as provided for the advertisement of the properties to be sold under foreclosure of the mortgage of the Farmers' Loan and Trust Company aforesaid. Said master shall also, at the same time and place or otherwise, as this court may direct, offer for sale, in such parcels and under such terms as the court may by supplemental decree or order direct, and sell all of the other property and assets of every description; and it is decreed that the court may make such further orders and decrees as may be necessary to carry out the provisions of this decree.

And the court further ordered that all equities and rights of any parties not hereinbefore specifically adjudged, and the rights and liabilities of the respective railroads and properties on account of earnings and expenses during the receivership, as between themselves, be expressly reserved for further adjudication, and that any party in interest may apply to the court by petition at the
88 foot of this decree for such other order or relief in the premises as the court may deem just.

And it appearing that written notice of an intention to appeal was given by the Southwestern Railroad Company at the conclusion of the hearing on June 29th, 1893, to its codefendant, The Central Railroad and Banking Company of Georgia, which has since been renewed, and the latter company has, in writing, declined to join therein, the court further ordered and decreed that these stand as an order of severance, with the right to the Southwestern Railroad Company to appeal alone without joining its said codefendant therein, the time to commence to run from the filing of this decree in the office of the clerk of the court.

Approved January 4th, 1894.

HOWELL E. JACKSON,
Circuit Justice.

Endorsement: No. 294. Circuit court of United States, eastern division of the southern district of Georgia. The Central Railroad and Banking Company of Georgia *vs.* The Farmers' Loan and Trust Company *et al.* The Farmers' Loan and Trust Company *vs.* The Central Railroad and Banking Company of Georgia *et al.* Alexander Brown & Sons *vs.* The Central Railroad and Banking Company of Georgia *et al.* Consolidated cause. Decree of foreclosure and sale. Signed January 4th, 1894. Filed in clerk's office January 15th, 1894. H. H. King, clerk.